

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
 2 PHILIP F. ATKINS-PATTENSON, Cal. Bar. No. 94901  
 3 TED C. LINDQUIST, III, Cal. Bar No. 178523  
 Four Embarcadero Center, Seventeenth Floor  
 3 San Francisco, California 94111  
 Telephone: (415) 434-9100  
 4 Facsimile: (415) 434-3947  
 E-mail: patkinspattenson@sheppardmullin.com  
 tlindquist@sheppardmullin.com

6 Attorneys for Defendant  
 7 DELTA AIR LINES, INC.

8  
 9 **UNITED STATES DISTRICT COURT**  
 10 **NORTHERN DISTRICT OF CALIFORNIA**  
 11 **(SAN FRANCISCO DIVISION)**

12 SPENCER R. McMULLEN, suing  
 13 individually and on behalf of all others  
 similarly situated,

14 Plaintiff,

15 v.

16 DELTA AIR LINES, INC., and  
 17 defendant Does 1 through 100,  
 inclusive.

18 Defendants.

Case No. CV 08-1523 (JSW)

**DECLARATION OF PHILIP F.  
 ATKINS-PATTENSON IN  
 SUPPORT OF DEFENDANT  
 DELTA AIR LINES, INC.'S  
 MOTION TO DISMISS**

(Filed concurrently with Delta Air  
 Lines, Inc.'s Notice of Motion and  
 Motion to Dismiss; Declaration of Scott  
 McClain)

19 Date: September 5, 2008  
 20 Time: 9:00 A.M.  
 Courtroom: 2 (17<sup>th</sup> Floor)

21 Complaint Filed: March 19, 2008  
 22 Served: June 16, 2008

23 I, Philip F. Atkins-Pattenson, hereby declare:

24  
 25 1. I am an attorney admitted to practice before all courts in the State  
 26 of California and am a member of the bar of this Court in good standing.  
 27

1           2. I am a partner in the law firm Sheppard, Mullin, Richter &  
2 Hampton LLP, attorneys for defendant Delta Airlines, Inc. ("Delta").  
3

4           3. I have personal knowledge of the matters stated herein and, if  
5 called as a witness, could and would competently testify thereto.  
6

7           4. I make this Declaration in support of Delta's motion to dismiss,  
8 filed concurrently herewith.  
9

10           5. Attached hereto as Exhibit 1 is a true and correct copy of the  
11 First Amended Class Action Complaint in *Maria Sanchez v. Compania Mexicana*  
12 *De Aviacion S.A.*; United States District Court for the Central District Case No. CV  
13 07-7196 R (RCx) (the "*Mexicana Airlines*" case)  
14

15           6. Attached hereto as Exhibit 2 is a true and correct copy of the  
16 Court's Findings of Fact and Conclusions of Law in the *Mexicana Airlines* case.  
17

18           7. Attached hereto as Exhibit 3 is a copy of the California Court of  
19 Appeal decision in *Waul v. American Airlines, Inc.*, 2003 WL 22719273 (Cal. App.  
20 1 Dist. Nov. 17, 2003).  
21

22           I declare under penalty of perjury under the laws of the United States  
23 that the foregoing is true and correct.  
24

25           Executed this 7<sup>th</sup> day of July 2008 at San Francisco, California.  
26

27             
28           Philip F. Atkins-Pattenson

# **EXHIBIT 1**

1 James S. Cahill, Esq. (SBN 070353)  
 2 Talin K. Tenley, Esq. (SBN 217572)  
**THE ROSSBACHER FIRM**  
 3 811 Wilshire Blvd., Suite 1650  
 Los Angeles, California 90017-2666  
 4 Telephone: (213) 895-6500  
 Facsimile: (213) 895-6161  
 Email: [jsca@rossbacher.xohost.com](mailto:jsca@rossbacher.xohost.com)  
[tkt@rossbacher.xohost.com](mailto:tkt@rossbacher.xohost.com)

6 Attorneys for Plaintiff MARIA  
 SANCHEZ  
 7  
 8

9 **UNITED STATES DISTRICT COURT**

10 **CENTRAL DISTRICT OF CALIFORNIA**

12 MARIA SANCHEZ, individually and  
 13 on behalf of all others similarly  
 situated,

14 v. Plaintiffs,

16 COMPANIA MEXICANA DE  
 17 AVIACION S.A., doing business as  
 MEXICANA AIRLINES and DOES 1  
 through 100, inclusive,

19 Defendants,

) Case No.: CV 07-7196 R (RCx)

**CLASS ACTION**

**FIRST AMENDED CLASS ACTION  
 COMPLAINT FOR:**

1. **BREACH OF WRITTEN  
 CONTRACTS;**
2. **BREACH OF IMPLIED  
 CONVENANT OF GOOD  
 FAITH AND FAIR DEALING;**
3. **UNJUST ENRICHMENT;  
 AND**
4. **MONEY HAD AND  
 RECEIVED**

**DEMAND FOR JURY TRIAL**

1 Plaintiff, Maria Sanchez, individually and on behalf of all others similarly  
2 situated, upon knowledge as to herself and her own acts, and upon information and  
3 belief as to all other matters, alleges as follows:

5 **NATURE OF THE ACTION**

6 1. Defendant Compania Mexicana De Aviacion S.A., doing business as  
7 Mexicana Airlines (hereinafter "Defendant" or "Defendant Airline") collects a  
8 tourism tax imposed by the Mexican government from all passengers traveling on  
9 Defendant Airline on international flights between California and Mexico.  
10 Defendant Airline, in turn, is supposed to remit the tourism tax receipts to the  
11 Mexican government. The Mexican tourism tax is collected by Defendant Airline  
12 from its airline passengers as part of the price of each passenger's airline ticket  
13 purchased from Defendant in California. However, passengers who are residents  
14 (holding FM-2 or FM-3 Visas) or citizens of Mexico, as well as diplomats, children  
15 under two years of age and persons staying in Mexico less than 24 hours are exempt  
16 from paying the Mexican tourism tax.  
17  
18 2. In breach of their passengers' written contracts for air travel, Defendant  
19 Airline has been unjustly enriched by improperly collecting from those passengers  
20 who are exempt from the Mexican tourism tax the amount of money equal to that  
21 tax.  
22  
23 3. This class action seeks to restore to Plaintiff and the Class members the  
24 amount of the Mexican tourism tax improperly collected by Defendant Airline  
25  
26

1 including, without limitation, relief in the form of damages and restitution, as  
2 requested in each cause of action.

3

4 **JURISDICTION AND VENUE**

5 4. This court has subject matter jurisdiction over this class action. This  
6 court has personal jurisdiction over the parties because Plaintiff submits to the  
7 jurisdiction of this court, and at all times material to this complaint Defendant  
8 Airline systematically and continually conducted business within Los Angeles  
9 County, California.

10  
11 5. Venue as to Defendant Airline is proper in this court pursuant to Code  
12 Civ. Proc. §§ 395(a) and 395.5.

13  
14 6. Federal subject matter jurisdiction does not exist for the claims for  
15 relief asserted in this complaint. There is no federal question jurisdiction here. The  
16 claims asserted herein only allege violations of California law. There is no diversity  
17 jurisdiction here because the \$75,000 amount in controversy threshold is not  
18 satisfied. The amount in controversy as to Plaintiff and each member of the Class  
19 does not exceed \$75,000. Plaintiff is informed and believes that the aggregate  
20 amount in controversy for Plaintiff and the Class totals less than \$5,000,000.00,  
21 exclusive of interest and costs.

22

23 **PARTIES**

24

25 **A. PLAINTIFF**

26  
27 7. In approximately July 2003, Plaintiff Maria Sanchez, an individual,

1 ("Plaintiff") purchased in California a roundtrip airline ticket from Defendant for  
2 travel on Defendant Airline, flight No. 927 on or about July 4, 2003 from Los  
3 Angeles, California to Guadalajara, Mexico. As part of the purchase price for said  
4 roundtrip airline ticket Plaintiff was charged by and paid approximately \$275.00 to  
5 Defendant which Plaintiff is informed and believes included the amount equal to the  
6 Mexican tourism tax in the approximate sum of \$22.00 (an amount that fluctuates  
7 with the dollar-peso exchange rates). Plaintiff was never notified that she was  
8 exempt from paying the Mexican tourism tax nor informed that she could claim a  
9 recovery of the amount improperly collected by Defendant Airline.

10 8. At all times material to this complaint, Plaintiff was and is a citizen of  
11 Mexico. As a citizen of Mexico, Plaintiff is exempt from paying the Mexican  
12 tourism tax when she travels to Mexico.

13 **B. DEFENDANTS**

14 9. Defendant Compania Mexicana De Aviacion S.A., doing business as  
15 Mexicana Airlines (hereinafter "Defendant" or "Defendant Airlines") is, and at all  
16 times material to this complaint, was, a corporation organized and existing under the  
17 laws of Mexico and conducting business in California, with its principal place of  
18 business in Los Angeles, California.

19 10. Plaintiff is ignorant of the true names and capacities of Defendants sued  
20 herein as DOES 1 through 100 inclusive, and therefore sues these Defendants by  
21 these fictitious names. Plaintiff will amend this complaint to allege their true names  
22  
23  
24

1 and capacities when ascertained. Plaintiff is informed and believes that each of the  
2 fictitiously named Defendants is responsible in some manner for the occurrences  
3 herein alleged, and that Plaintiff's injuries as herein alleged were proximately  
4 caused by these Defendants.

5 11. Plaintiff is informed and believes that at all times material to this  
6 complaint, Defendant Airline and each of the Defendants fictitiously named in this  
7 complaint in addition to acting for himself, herself, or itself and on his, her, or its  
8 own behalf individually, is and was acting as the agent, servant, employee and  
9 representative of, and with the knowledge, consent and permission of, and in  
10 conspiracy with, and/or aided and abetted each and all of the Defendants and within  
11 the course, scope and authority of that agency, service, employment, representation,  
12 and conspiracy. Plaintiff further alleges on information and belief that the acts of  
13 each of the Defendants were fully ratified by each and all of the Defendants.  
14 Specifically, and without limitation, Plaintiff alleges on information and belief that  
15 the actions, failures to act, breaches, conspiracy, aiding and abetting alleged herein  
16 and attributed to one or more of the specific Defendants were approved, ratified, and  
17 done with the cooperation and knowledge of each and all of the Defendants.  
18

19 **CLASS ACTION ALLEGATIONS**

20 12. This action is brought as a class action pursuant to Code Civ. Proc. §  
21 382 on behalf of the following Class:  
22

23 All persons who purchased airline tickets in California

1 from Defendant Airline for travel on Defendant Airline on  
2 international flights between California and Mexico and  
3 who paid Defendant as part of the price for his or her  
4 airline ticket the Mexican tourism tax but who were  
5 exempt from paying that tourism tax (the "Class").

6 Persons exempt from paying Mexican tourism tax include  
7 residents (holding FM-2 or FM-3 Visas) or citizens of  
8 Mexico, diplomats, children under two years of age and  
9 persons not remaining in Mexico for more than 24 hours.  
Excluded from the Class are (a) Defendant Airline; (b)  
employees of Defendant including its officers and  
directors; and (c) Defendant's parents, subsidiaries and  
affiliates.

10 13. Plaintiff does not know the exact number of Class members because  
11 such information is in the exclusive control of Defendant Airline. However,  
12 Plaintiff is informed and believes that due to the nature of the trade and commerce  
13 involved, Class members are sufficiently numerous, and geographically dispersed  
14 throughout California, and that joinder of all Class members is impracticable. The  
15 information as to the identity of the Class members can be readily determined from  
16 records maintained by the Defendant and its agents.  
17

18 14. Plaintiff's claims are typical of, and not antagonistic to, the claims of  
19 the other Class members in that the claims of all members of the Class, result from  
20 the Defendant's collecting Mexican tourism tax from persons exempt from paying  
21 that tax. Plaintiff will advance the claims of all members of the Class who were  
22 injured by the same improper conduct of Defendant and the relief sought is common  
23 to the Class as alleged in this complaint.  
24

25 15. The common legal and factual questions which do not vary from Class  
26

1 member to Class member and which may be determined without reference to  
2 individual circumstances of any Class member include, but are not limited to, the  
3 following:

- 5 a. Whether Defendant Airline collected the Mexican tourism tax  
6 from Plaintiff and others Class members who do not owe that tax  
7 on their air trips to Mexico;
- 9 b. Whether Defendant Airline advised Plaintiff and other Class  
10 members that they were exempt from paying the Mexican  
11 tourism tax on their air trips to Mexico or otherwise made  
12 arrangements to allow for their recovery of the Mexican tourism  
13 tax collected by Defendant;
- 16 c. Whether Defendant Airline breached its written contract(s) with  
17 Plaintiff and other Class members;
- 18 d. Whether Defendant Airline breached the implied covenant of  
19 good faith and fair dealing;
- 21 e. Whether Defendant Airline was unjustly enriched by its conduct;
- 22 f. Whether Defendant Airline became indebted to Plaintiff and  
23 other Class members for money had and received; and
- 25 g. Whether Plaintiff and other Class members are entitled to  
26 monetary recovery, including damages and restitution, and the  
27 proper measure, nature and extent of such relief.

1       16. These common questions and others predominate over questions, if  
2 any, that affect only individual members of the Class.

3       17. Plaintiff and her lawyers will fairly and adequately represent the  
4 interests of the Class because Plaintiff is typical of other Class members improperly  
5 charged the Mexican tourism tax by Defendant Airline. There are no material  
6 conflicts with any other member of the Class that would make class certification  
7 inappropriate. Plaintiff has retained attorneys who are experienced in the  
8 prosecution of class actions, including complex cases and consumer actions, and  
9 Plaintiff intends to prosecute this action vigorously.

10       18. A class action is superior to other available methods for the fair and  
11 efficient adjudication of this controversy because individual litigation of the claims  
12 of all Class members is impracticable. Even if every Class member could afford  
13 individual litigation, the court system could not. It would be unduly burdensome on  
14 the court if individual litigation of numerous cases would proceed. By contrast, the  
15 conduct of this action as a class action, with respect to some or all of the issues  
16 alleged in this complaint, presents fewer management difficulties, conserves the  
17 resources of the parties and of the court system, and protects the rights of each Class  
18 member.

19       19. Prosecution of separate actions by individual Class members would  
20 create the risk of inconsistent or varying adjudications, establishing incompatible  
21 standards of conduct for Defendant Airline and would magnify the delay and  
22

1 expense to all parties and to the court system resulting from multiple trials of the  
2 same complex factual issues.  
3

4 20. Whatever difficulties may exist in the management of the class action  
5 will be greatly outweighed by the benefits of the class action procedure, including,  
6 but not limited to, providing Class members with a method for the redress of claims  
7 that may not otherwise warrant individual litigation.  
8

9 **FACTUAL ALLEGATIONS**

10 21. Defendant Airline is, and at all times material to this complaint was,  
11 engaged in the business of common carrier by air of passengers for transport  
12 between California and Mexico.  
13

14 22. At all times mentioned herein, when passengers purchase their tickets  
15 in California for air travel on Defendant Airline between California and Mexico,  
16 Defendant routinely collects from its passengers the Mexican tourism tax which is  
17 included in the price of each passenger's airline ticket. The amount equal to the  
18 Mexican tourism tax cannot be determined from the information provided by  
19 Defendant. Defendant Airline is an authorized agent of the Mexican government to  
20 collect the tourism tax from its airline passengers on international flights between  
21 California and Mexico and is obligated to remit the tax to the Mexican government.  
22 Defendant collects approximately \$22.00 from each passenger per flight who travels  
23 between Mexico and California on Defendant Airline for this tourism tax. (The  
24 amount of the tax collected by Defendant Airline fluctuates, depending on the  
25  
26  
27  
28

1 dollar-peso exchange rate.)

2 23. Under Mexican law airline passengers traveling to Mexico who are  
3 residents (holding FM-2 or FM-3 Visas) or citizens of Mexico as well as diplomats  
4 children under two years of age and persons staying in Mexico less than 24 hours  
5 are exempt from paying the Mexican tourism tax.

6 24. After passengers have purchased their tickets from Defendant Airline  
7 and when passengers check in before their flights depart from California to Mexico,  
8 Defendant Airline could identify the exempt passengers and could return to them the  
9 amount of the improperly collected Mexican tourism tax, or make other  
10 arrangements for a return of the improperly collected amount, including but not  
11 limited to notifying the exempt passengers of their entitlement to a return.  
12 However, despite its opportunity to do so, Defendant Airline failed to disclose to  
13 exempt passengers (including Plaintiff and other Class members) that they are  
14 entitled to a return of the improperly paid Mexican tourism tax and return the  
15 amount improperly collected by Defendant Airline.

16 25. Plaintiff is informed and believes that Defendant Airline does not remit  
17 to the Mexican government the amounts of the tourism tax paid by exempt  
18 passengers. Defendant Airline does not return the tourism tax improperly collected  
19 from its exempt passengers, nor provide an opportunity for them to claim a return of  
20 the improperly paid amount.

21 27 ///

## **ESTOPPEL FROM PLEADING AND TOLLING OF APPLICABLE STATUTES OF LIMITATIONS**

3 26. Defendants are estopped from relying on any statutes of limitations. At  
4 all times material to this complaint, Defendant Airline failed to disclose to Plaintiff  
5 and other Class members that the Mexican tourism tax was not due from them as  
6 exempt passengers, and that as exempt passengers they were entitled to a return of  
7 the amount they paid for that tax. Plaintiff and the members of the Class could not  
8 reasonably have discovered Defendants' wrongdoing. Given Defendants' failure to  
9 disclose this information about their exempt status to its passengers from paying the  
10 Mexican tourism tax for their air travel between California and Mexico, Defendants  
11 are estopped from relying on any statutes of limitations that might otherwise be  
12 applicable to the claims asserted herein.  
13  
14  
15

## **FIRST CAUSE OF ACTION**

## **(Breach Of Written Contracts Against All Defendants)**

19       27. Plaintiff incorporates and realleges by this reference the allegations  
20 contained in paragraphs 1 through 26, inclusive, of this complaint. Plaintiff brings  
21 this claim for herself and on behalf of members of the Class.

23       28. Within four years prior to the filing of this complaint, Defendant  
24 Airline entered into written contracts in California with Plaintiff and other Class  
25 members for air travel between California and Mexico and specifying the date,  
26 flight number, origin and destination plus the price of the airline ticket. The terms  
27

1 of these contracts are contained in the respective airline tickets and “e-ticket  
2 agreement” on Defendant Airline’s website at  
3  
4 [www.mexicana.com/cs/Satellite?pagename=MexicanaG5/MexContainer\\_C/Landing](http://www.mexicana.com/cs/Satellite?pagename=MexicanaG5/MexContainer_C/Landing)  
5 Bank News&cid=1160406052781&ChannelID=1143494208293&siteID=1143494  
6 205438&IdNews=1160406052841. In particular, Defendant’s contracts with  
7 Plaintiff and the Class members state, in part, as follows: “The price of this ticket  
8 may include taxes and fees, which are imposed on the air transportation by  
9 government authorities. These taxes and fees, which may represent a significant  
10 portion of the cost of air travel, are either included in the fare, or shown separately  
11 in the tax box(es) of this ticket.” Plaintiff and the Class paid for the purchase of  
12 their tickets to Defendant Airline by paying U.S. dollars or using frequent flyer  
13 miles.

14 29. Along with the portion of the price for the airline ticket to be retained  
15 by Defendant Airline, Defendant also collected from Plaintiff and other Class  
16 members, at the time the tickets were purchased, a number of taxes for various  
17 taxing authorities, including the Mexican tourism tax. At all times material to this  
18 complaint, Defendant Airline promised Plaintiff and other Class members that  
19 Defendant only collects applicable taxes imposed by government authorities it is  
20 required to collect from passengers who owe the taxes.

21 30. Plaintiff and Class members have performed all conditions, covenants  
22 and promises required on their part to be performed in accordance with the terms of  
23

1 said written contracts, including payment to Defendant Airline of the ticket fares  
2 and amounts claimed as taxes for each ticket.  
3

4 31. Within four years prior to the filing of this complaint, Defendant  
5 Airline breached its written contracts with Plaintiff and Class members by  
6 improperly collecting from them the amount of the Mexican tourism tax  
7 (approximately \$22.00) for each airline ticket which was not applicable to Plaintiff  
8 and Class members due to their exempt status under Mexican law.  
9

10 32. As a proximate result of Defendant Airline's breach of the written  
11 contracts, Plaintiff and each Class member have been damaged in the amount  
12 improperly collected from them for the Mexican tourism tax for each airline ticket  
13 in an amount according to proof, plus interest thereon at the maximum legal rate  
14 until entry of judgment.  
15

16 **SECOND CAUSE OF ACTION**  
17

18 **(Breach of Implied Covenant Of Good Faith And Fair Dealing Against All  
19 Defendants)**

20 33. Plaintiff incorporates and realleges by this reference the allegations  
21 contained in paragraphs 1 through 32, inclusive, of this complaint. Plaintiff brings  
22 this claim for herself and on behalf of members of the Class.  
23

24 34. The written contracts between Plaintiff and the Class on one hand, and  
25 Defendant Airline include an implied covenant of good faith and fair dealing that  
26 neither party would do anything to injure the right of the other party to receive the  
27  
28

1 benefits of the agreement.

35. After the written contracts took effect, Defendant Airline failed to  
3 inform Plaintiff and other Class members that the Mexican tourism tax was not due  
4 from them as exempt passengers, and that, as exempt passengers they were entitled  
5 to a return of the amount they improperly paid for that tax. Defendant Airline was  
6 in a superior position to know the true facts about the Mexican tourism tax and was  
7 duty-bound to make such disclosures to Plaintiff and other Class members.  
8  
9 Defendant's failure to make such disclosures after the written contracts took effect  
10 has unfairly prevented Plaintiff and Class members from receiving the benefits of  
11 their contracts. In acting in this manner, Defendant Airline violated the implied  
12 covenant of good faith and fair dealing that exists in the contracts between Plaintiff  
13 and other Class members and Defendant Airline.  
14  
15

17       36. As a proximate result of Defendant Airline's breach of its implied  
18 covenant of good faith and fair dealing, Plaintiff and each Class member have been  
19 damaged in the amount improperly retained by Defendant Airline for the Mexican  
20 tourism tax for each airline ticket in an amount according to proof, plus interest  
21 there on at the maximum legal rate until entry of judgment.

### **THIRD CAUSE OF ACTION**

### **(Unjust Enrichment Against All Defendants)**

26       37. Plaintiff incorporates and realleges by this reference the allegations  
27  
28 contained in paragraphs 1 through 36, inclusive, of this complaint. Plaintiff brings

this claim for herself and on behalf of members of the Class.

38. Defendant Airline has been unjustly enriched because it knowingly gained and retained money in an inequitable manner at the expense of its passengers and is thus accountable to the Plaintiff and the members of the Class to restore such money. The Defendant may not retain the benefits from its improper conduct and those benefits belong instead to Plaintiff and members of the Class. Defendant Airline must make restitution of all amounts so improperly and unjustly obtained according to proof, plus interest at the maximum legal rate until entry of judgment.

#### FOURTH CAUSE OF ACTION

**(Money Had And Received Against All Defendants)**

39. Plaintiff incorporates and realleges by this reference the allegations contained in paragraph 1 through 38, inclusive, of this complaint. Plaintiff brings this claim for herself and on behalf of members of the Class.

40. Within four years prior to the filing of this complaint, Defendant Airline became indebted to Plaintiff and other Class members for money had and received by Defendant Airline for the use and benefit of Plaintiff and other Class members in an amount according to proof.

41. No payment has been made by Defendant Airline to Plaintiff and the other Class members, and there is now owing to Plaintiff and Class members the amount improperly retained by Defendant Airline for the Mexican tourism tax for each airline ticket in an amount according to proof, plus interest thereon at the

1 maximum legal rate until entry of judgment.

2 **PRAYER FOR RELIEF**

3  
4 WHEREFORE, on behalf of herself and the Class, Plaintiff prays for  
5 judgment against Defendants as follows:

6 1. For certification of the proposed Class appointing Plaintiff and her  
7 counsel to represent the Class, and notice to the Class to be paid by Defendants;

9 2. For compensatory damages suffered by Plaintiff and Class members in  
10 an amount according to proof on the First, Second and Fourth Causes of Action;

12 3. For restitution to Plaintiff and Class members in addition to  
13 other unjust enrichment of Defendants in an amount according to proof on the Third  
14 Cause of Action;

16 4. For an award of attorney's fees pursuant to Code Civ. Proc. §1021.5, or  
17 any other provision of law;

18 5. For prejudgment interest;

20 6. For costs of suit; and,

21 ///

22 ///

24 ///

25 ///

26 ///

27 ///

28 ///

7. For such other and further relief as the court may declare just and proper.

Dated: January 9, 2008

Respectfully submitted,

## THE ROSSBACHER FIRM

By: /s/ Talin K. Tenley  
Talin K. Tenley

Attorney for Plaintiff

6202.003/mr: 1<sup>ST</sup> AMENDED COMPLAINT, MEXICANA

## **DEMAND FOR JURY TRIAL**

Plaintiff on behalf of herself and all others similarly situated hereby request a jury trial on the claims so triable.

Dated: January 9, 2008

Respectfully submitted,

## THE ROSSBACHER FIRM

By: /s/ Talin K. Tenley  
Talin K. Tenley

Attorney for Plaintiff

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF  
CALIFORNIA**

**CASE NAME: MARIA SANCHEZ v. COMPAÑIA MEXICANA DE  
AVIACION S.A., doing business as MEXICANA AIRLINES**

**CASE NUMBER: CV07-7196 R (RCx)**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 811 Wilshire Blvd., Ste. 1650, Los Angeles, California 90017-2666.

On January 9, 2008, I served the following document on the parties in this action listed below in the manner designated below:

**FIRST AMENDED CLASS ACTION COMPLAINT FOR: 1. BREACH OF WRITTEN CONTRACTS; 2. BREACH OF IMPLIED CONVENTION OF GOOD FAITH AND FAIR DEALING; 3. UNJUST ENRICHMENT; AND 4. MONEY HAD AND RECEIVED**

Frank A. Silane, Esq.  
Jennifer J. Johnston, Esq.  
**CONDON & FORSYTH LLP**  
1901 Avenue of the Stars, Suite 850  
Los Angeles, California 90067-6010  
Email: [fsilane@condonlaw.com](mailto:fsilane@condonlaw.com)  
[jjohnston@condonlaw.com](mailto:jjohnston@condonlaw.com)

Attorneys for Defendants

**BY NOTICE OF ELECTRONIC FILING.** The above-listed counsel have consented to electronic service and have been automatically served by the Notice of Electronic Filing, which is automatically generated by CM/ECF at the time said document was filed, and which constitutes service pursuant to FRCP 5(b)(2)(D).

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on January 9 2008, at Los Angeles, California

/s/ Maricela Ruiz  
Maricela Ruiz

## **EXHIBIT 2**

1 Frank A. Silane (State Bar No.: 90940)  
2 Jennifer J. Johnston (State Bar No.: 125737)  
CONDON & FORSYTH LLP  
1901 Avenue of the Stars, Suite 850  
3 Los Angeles, California 90067-6010  
Telephone: (310) 557-2030  
4 Facsimile: (310) 557-1299  
Email: [fsilane@condonlaw.com](mailto:fsilane@condonlaw.com)  
5 Email: [jjohnston@condonlaw.com](mailto:jjohnston@condonlaw.com)

6 Attorneys for Defendant  
COMPANIA MEXICANA DE AVIACION, S.A. DE C.V.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

11 MARIA SANCHEZ, individually and on behalf of all others similarly situated. } Case No. CV 07-7196 R (RCx)

Plaintiffs,

VS.

14  
15 COMPANIA MEXICANA DE  
16 AVIACION S.A., doing business as  
MEXICANA AIRLINES, and DOES 1  
through 100, inclusive.

17 Defendants.

## **FINDINGS OF UNDISPUTED FACTS AND CONCLUSIONS OF LAW**

19 After consideration of all the papers filed in support of and in opposition to  
20 defendant Compania Mexicana de Aviacion, S.A. de C.V.'s motion to dismiss or,  
21 in the alternative, for summary judgment, the pleadings on file in this lawsuit, and  
22 the oral argument of counsel, the Court has concluded that the following facts are:

## UNDISPUTED FACTS

25 1. Plaintiff Maria Sanchez is a citizen and resident of the state of  
26 California. Plaintiff claims that she is a citizen of both the United States and  
27 Mexico. (See First Amended Class Action Complaint, para. 8.)

1       2. Defendant Compania Mexicana de Aviacion, S.A. de C.V. (doing  
2 business as "Mexicana") is an airline organized and existing under the laws of  
3 Mexico, with its principal place of business in Mexico City, Mexico. Mexicana  
4 sells airline tickets in the state of California and operates flights to and from the  
5 state of California.

6       3. Plaintiff Maria Sanchez has filed a First Amended Class Action  
7 Complaint against Mexicana seeking recovery of, on behalf of herself and others, a  
8 certain Mexican tourism tax imposed by the government of Mexico and collected  
9 by airlines on behalf of the government of Mexico in connection with the sale of  
10 passenger tickets for flights to Mexico. The First Amended Class Action  
11 Complaint states claims for breach of written contract, breach of the implied  
12 covenant of good faith and fair dealing, money had and received and unjust  
13 enrichment. (*See* First Amended Class Action Complaint.)

14       4. Plaintiff Maria Sanchez seeks to represent a class of "[a]ll persons  
15 who purchased airline tickets in California from Defendant Airline for travel on  
16 Defendant Airline on international flights between California and Mexico and who  
17 paid Defendant as part of the price for his or her airline ticket the Mexican tourism  
18 tax but who were exempt from paying that tourism tax (the 'Class')." (*See* First  
19 Amended Class Action Complaint, para. 12.)

20       5. Plaintiff Maria Sanchez alleges that in connection with the sale of  
21 passenger tickets in California for international flights between California and  
22 Mexico, Mexicana collects a tourism tax imposed by the government of Mexico.  
23 Plaintiff further alleges that the Mexican tourism tax is collected by Mexicana as  
24 part of the price of the passenger ticket. (*See* First Amended Class Action  
25 Complaint, paras. 1, 22.) Mexicana does not contest these facts. (*See* Declaration  
26 of Rogelio Silva Sanchez in Support of Motion for Summary Judgment, paras. 3,  
27 5.)

28

-2-

1       6. Plaintiff Maria Sanchez further alleges that in connection with the  
2 collection of the Mexican tourism tax, Mexicana acts as the agent of the  
3 government of Mexico and is obligated to remit all sums collected for the Mexican  
4 tourism tax to the government of Mexico. (See First Amended Class Action  
5 Complaint, para. 22.) Mexicana does not contest these facts. (See Declaration of  
6 Rogelio Silva Sanchez, para. 4.)

7       7. Plaintiff Maria Sanchez bases her claims on a ticket purchased on July  
8 4, 2003, which provided for transportation from Los Angeles to Guadalajara on  
9 July 4, 2003. (See Declaration of Maria Sanchez in Support of Plaintiff's  
10 Opposition to Motion to Dismiss, or in the Alternative, for Summary Judgment,  
11 para. 2.) Mexicana does not contest that a passenger ticket was purchased for  
12 plaintiff Maria Sanchez on July 4, 2003, which provided for transportation from  
13 Los Angeles to Guadalajara on July 4, 2003. (See Declaration of Maru Johansen in  
14 Support of Compania Mexicana de Aviacion, S.A. de C.V.'s Reply to Plaintiff's  
15 Opposition to Motion to Dismiss or, in the Alternative, for Summary Judgment,  
16 para. 10.)

17       8. As part of the purchase price for the ticket, plaintiff Maria Sanchez  
18 alleges she was charged and paid approximately \$275, which sum included a  
19 charge for the Mexican tourism tax. (See First Amended Class Action Complaint,  
20 para. 7; *see also* Declaration of Maria Sanchez, para. 2.)

21       9. The records relating to the purchase of plaintiff Maria Sanchez's  
22 passenger ticket establish that her ticket was purchased in Mexico. (See  
23 Declaration of Maru Johansen, paras. 10-14.)

24       10. Plaintiff Maria Sanchez filed her initial Class Action Complaint on  
25 September 28, 2007, more than four years from the date on which her ticket was  
26 purchased and more than four years from the date of her transportation on  
27 Mexicana. (See Class Action Complaint.)

28

1       11. Plaintiff Maria Sanchez claims that she was exempt under Mexican  
 2 law from payment of the Mexican tourism tax because she is a citizen of Mexico.  
 3 (See Declaration of Maria Sanchez, para. 4.)

4       12. Plaintiff Maria Sanchez further alleges that she and other proposed  
 5 class members entered into contracts of carriage with Mexicana when they  
 6 purchased their passenger tickets. Plaintiff does not allege that Mexicana refused  
 7 to transport her or any other person pursuant to the contracts of carriage. Instead,  
 8 plaintiff alleges that Mexicana breached the contracts of carriage by collecting the  
 9 tourism tax from her and other passengers who were purportedly exempt.

10      13. Plaintiff Maria Sanchez's sole basis for her claim that Mexicana had a  
 11 contractual duty to advise her and other passengers of their rights with respect to  
 12 the Mexican tourism tax and that they may be exempt from paying the Mexican  
 13 tourism tax is the following language from Mexicana's website: "The price of this  
 14 ticket may include taxes and fees, which are imposed on the air transportation by  
 15 government authorities. These taxes and fees, which may represent a significant  
 16 portion of the cost of air travel, are either included in the fare, or shown separately  
 17 in the tax box(es) of this ticket." (See First Amended Class Action Complaint,  
 18 para. 28.)

19      14. Mexicana has filed a motion for summary judgment seeking judgment  
 20 in its favor on the grounds that all claims alleged in the First Amended Class  
 21 Action Complaint are preempted by the Airline Deregulation Act.

22      15. The Court finds that plaintiff Maria Sanchez has failed to present a  
 23 single triable issue of material fact supporting her assertions that her claims do not  
 24 relate to Mexicana's prices, routes or services.

25      16. The undisputed facts establish that all of the claims asserted in the  
 26 First Amended Class Action Complaint concerning the Mexican tourism tax relate  
 27 to Mexicana's prices, routes and services and are preempted by the Airline

1 Deregulation Act.

2       17. The claims asserted in the First Amended Class Action Complaint  
3 concerning the collection of the Mexican tourism tax relate to Mexicana's prices  
4 because the Mexican tourism tax is collected together with the purchase price of  
5 the passenger ticket and is related to and intertwined with the sale, price, and  
6 issuance of the passenger tickets.

7       18. The claims asserted in the First Amended Class Action Complaint  
8 concerning the Mexican tourism tax also relate to Mexicana's routes and services  
9 because the Mexican tourism tax is collected only on routes between Mexico and  
10 other countries and it is part of the services provided by Mexicana to its customers  
11 to facilitate the flow of passengers through Mexican airports by eliminating the  
12 need for passengers to stand in line at Mexican airports to pay the tourism tax prior  
13 to entering the country.

14       19. The Court finds that plaintiff Maria Sanchez also has failed to present  
15 a single triable issue of material fact supporting her assertions that Mexicana  
16 committed a breach of contract.

17       20. The undisputed facts establish that Mexicana did not undertake and  
18 did not breach any contract with plaintiff Maria Sanchez or any other proposed  
19 class member with respect to the Mexican tourism tax.

20       21. Neither the language from Mexicana's website asserted by plaintiff  
21 Maria Sanchez as the sole basis for her contract claims against Mexicana, nor any  
22 other evidence offered by the plaintiff, created any contractual obligation on the  
23 part of Mexicana to advise plaintiff or any other passenger of his or her rights or  
24 obligations under Mexican law with respect to the payment or non-payment of the  
25 Mexican tourism tax or rights to refunds of the tourism tax.

26       22. The undisputed facts establish that plaintiff Maria Sanchez is  
27 attempting to impose obligations on Mexicana which Mexicana did not undertake

1 in its contract of carriage. The imposition of such obligations on Mexicana would  
2 relate to and thereby affect Mexicana's prices, routes, and services. Accordingly,  
3 the claims are preempted by the Airline Deregulation Act.

4       23. The Court finds that plaintiff Maria Sanchez has provided no facts  
5 which would establish any right in law or equity to have the statute of limitations  
6 relating to her claims tolled.

7       24. The Court finds that the undisputed facts establish that plaintiff Maria  
8 Sanchez's claims are time-barred by California's four-year statute of limitations.

9       25. The Court finds that the undisputed facts establish that plaintiff Maria  
10 Sanchez's claims fall outside of the proposed class which is limited to those  
11 persons purchasing tickets in California.

13 The Court makes the following:

## **CONCLUSIONS OF LAW**

15       1. Plaintiff Maria Sanchez's claims and the claims of all proposed class  
16 members are preempted, as a matter of law, by the Airline Deregulation Act of  
17 1978 (ADA), 49 USC § 1305 (reenacted at 49 U.S.C. § 41713) because the claims  
18 all relate to Mexicana's prices, routes and services. *See Rowe v. N.H. Motor*  
19 *Transp. Ass'n*, No. 06-457, slip op., 552 U.S. \_\_ (2008) WL 440686 (U.S.  
20 February 20, 2008); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992);  
21 *Buck v. Am. Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007).

22        2.     Claims seeking reimbursement of government fees and taxes,  
23 including charges on behalf of foreign sovereigns such as the Mexican  
24 government, which are collected by Mexicana with the purchase price of a  
25 passenger ticket are preempted by the Airline Deregulation Act, because they are  
26 related to the prices charged by airlines. Since the tourism tax which plaintiffs  
27 here seek to recover is collected by Mexicana as part of the price of the passenger

1 ticket, the tourism tax is related to pricing, and all claims asserted by plaintiff  
 2 Maria Sanchez on behalf of herself and others are preempted by the Airline  
 3 Deregulation Act, as a matter of law. *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 34-  
 4 36 (1st Cir. 2007).

5 3. The preemptive coverage of the Airline Deregulation Act also applies  
 6 to routes and services which are provided by the airline. See 49 U.S.C. § 41713.  
 7 As the tourism tax is charged only on routes between Mexico and other countries  
 8 and as the collection of the tourism tax at the time of ticketing is a service  
 9 facilitating the flow of passengers through the airports in Mexico, plaintiff Maria  
 10 Sanchez's claims and the claims of all proposed class members are preempted by  
 11 the Airline Deregulation Act on the grounds that the claims are related to  
 12 Mexicana's routes and services. *Rowe v. N.H. Motor Transp. Ass'n*, No. 06-457,  
 13 slip op., 552 U.S. \_\_ (2008), WL 440686 (U.S. February 20, 2008).

14 4. Plaintiff Maria Sanchez's claim that Mexicana breached contractual  
 15 obligations relating to Mexicana's collection of the Mexican tourism tax fails as a  
 16 matter of law. As a matter of law, the language relied upon by plaintiff from  
 17 Mexicana's website as the sole basis for imposing a duty on Mexicana does not  
 18 create any contractual obligation on the part of Mexicana to advise plaintiff of her  
 19 rights or obligations regarding the payment or non-payment of the Mexican  
 20 tourism tax under Mexican law or her rights to a refund of the tax, nor does it  
 21 create any other contractual obligation on the part of Mexicana with respect to  
 22 plaintiff's rights or obligations relating to the Mexican tourism tax. See, e.g., *Buck*  
 23 *v. Am. Airlines, Inc.*, 476 F.3d 29, 36-38 (1st Cir. 2007).

24 5. The undisputed facts establish that plaintiff Maria Sanchez is  
 25 attempting to impose obligations on Mexicana which Mexicana did not undertake  
 26 in its contract of carriage. The imposition of such obligations on Mexicana would  
 27 relate to and thereby affect Mexicana's prices, routes, and services. Accordingly,  
 28

1 the claims are preempted by the Airline Deregulation Act. *Rowe v. N.H. Motor*  
2 *Transp. Ass'n*, No. 06-457, slip op., 552 U.S. \_\_ (2008) WL 440686 (U.S.  
3 February 20, 2008); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992);  
4 *Buck v. Am. Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007).

5 6. The Court concludes that, as a matter of law, plaintiff Maria  
6 Sanchez's claims are time-barred by California Civil Procedure Code § 337(1).

7 7. The Court concludes that as a separate and distinct basis for  
8 dismissing plaintiff Maria Sanchez's claims, the records relating to the purchase of  
9 plaintiff's passenger ticket demonstrate that the ticket was purchased in Mexico.  
10 Since the ticket which forms the basis for plaintiff's claims was purchased in  
11 Mexico, plaintiff's claims fall outside of the proposed class which she seeks to  
12 represent, and plaintiff, as a matter of law, has no standing to bring her claims or  
13 represent the proposed class.

14 8. The undisputed facts establish that there is no genuine issue as to any  
15 material facts with respect to the liability of Mexicana as to any of the claims  
16 alleged by plaintiff Maria Sanchez or any other proposed class member in this  
17 lawsuit and that all claims are preempted by the Airline Deregulation Act.  
18 Mexicana is, therefore, entitled to a judgment as a matter of law dismissing this  
19 lawsuit, with prejudice, and on the merits.

20  
21 Dated: March 25, 2008



22  
23 Honorable Manuel L. Real  
United States District Judge

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## **EXHIBIT 3**

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Waul v. American Airlines, Inc.

Cal.App. 1 Dist., 2003.

Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, First District, Division 3, California.

Michael A. WAUL, Plaintiff and Appellant,  
v.

AMERICAN AIRLINES, INC., Defendant and Respondent.

No. A101212.

(San Francisco County Super. Ct. No. 320607).

Nov. 17, 2003.

Michael Anthony Waul, San Francisco, CA, for Plaintiff-appellant.

Carol Lynn Thompson, Heller Ehrman White et al, San Francisco, CA, for Defendant-respondent.

POLLAK, J.

\*1 Plaintiff Michael Waul appeals from a judgment entered after the trial court sustained the demurrer of defendant American Airlines, Inc. (AA) to his second amended complaint. Under the Unfair Competition Law (UCL), Business and Professions Code section 17200, plaintiff challenges defendant's failure to award frequent flyer miles to members of its AAdvantage frequent flyer program who purchased, but did not use, nonrefundable airline tickets. The trial court concluded that the amended complaint failed to allege a breach of contract cause of action against the airlines that was not preempted by the Airline Deregulation Act of 1978(ADA), 49 United States Code section 41713(b)(1). We agree and affirm the judgment.

#### Factual and Procedural Background

Plaintiff's second amended complaint (complaint)

for restitution and injunctive relief alleges three causes of action under the UCL. We accept the following material factual allegations of the complaint as true (see *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967): Numerous California consumers contracted with defendant by joining its AAdvantage frequent flyer program. A number of these California consumers "utilized the services of Defendant AA's airline by purchasing and paying for non-refundable airline tickets for flights on Defendant AA's airline. When said California consumers purchased and paid for flights on AA's airline, they also purchased and paid for frequent flyer miles from Defendants." These consumers "reasonably believed and expected that they would receive the frequent flyer miles when they purchased said non-refundable airline tickets and frequent flyer miles," but defendant "routinely and systematically breached [its] contracts with [these] California consumers by not crediting frequent flyer miles from Defendant AA, if said California consumers were unable to complete their flight itineraries as purchased. Defendant[ ] did not credit such purchasers with frequent flyer miles even though Defendant[ ] did not refund the purchase price of the unused airline tickets."

Plaintiff's complaint alleges that by failing to credit frequent flyer miles to California consumers who bought but did not use nonrefundable airline tickets, defendant breached its contracts with those consumers, and that in doing so, defendant also breached the implied covenant of good faith and fair dealing. Each cause of action alleges that these systematic breaches of contract constituted an unfair, illegal or deceptive business practice in violation of the UCL. The complaint does not allege an independent cause of action for breach of contract.

Defendant demurred to the complaint on the ground that plaintiff's claims were expressly preempted by the ADA and, alternatively, that plaintiff had failed properly to allege a breach of contract. At the hearing on the demurrer, the trial court indicated that

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the demurrer would be sustained without leave to amend unless plaintiff demonstrated that he could plead a breach of contract claim that fell outside the scope of ADA preemption as set forth in *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219 (*Wolens*). Thereafter, the court issued its order sustaining defendant's demurrer without leave to amend. Plaintiff filed a timely notice of appeal.

### Discussion

\*2 The ruling sustaining the demurrer is reviewed de novo. This court must examine the complaint to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 742.) The denial of leave to amend, however, is reviewed for an abuse of discretion. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

#### Scope of ADA Preemption

Section 41713, subdivision (b)(1) of the ADA prohibits a state from enact [ing] or enforc[ing] a law ... related to a price, route, or service of an air carrier.... The related to language in the ADA preemption clause has been defined as meaning having a connection with, or reference to, airline rates, routes, or services. (*Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 384 (*Morales*).) In *Morales*, the United States Supreme Court concluded that state restrictions on deceptive advertising were the type of economic regulation that Congress intended to preempt in deregulating the airline industry. Restrictions on advertising serv[e] to increase the difficulty of discovering the lowest cost seller ... and [reduce] the incentive to price competitively. [Citation.] ... [P]rice advertising surely relates to price. [Citation.] (*Id.* at pp. 388-389.) Accordingly, the court held that state actions challenging deceptive or fraudulent advertising practices had the forbidden significant effect on rates, routes, or service, and thus were preemp-

ted. (*Id.* at p. 388.)

Thereafter, in *Wolens, supra*, 513 U.S. at page 222, the Supreme Court again addressed the scope of the preemption clause. The court held that the ADA preempted a cause of action based on the Illinois Consumer Fraud and Deceptive Business Practices Act (815 Ill. Comp. Stat. 505 (1992)), the terms of which are similar to the UCL, because the Illinois act serves as a means to guide and police the marketing practices of the airlines. (*Id.* at p. 228.) Nonetheless, the court did not read the ADAs preemption clause ... to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airlines alleged breach of its own, self-imposed undertakings. (*Ibid.*) The terms and conditions airlines offer and passengers accept are privately ordered obligations and thus do not amount to a States enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law within the meaning of the [ADA]. (*Id.* at pp. 228-229.) "The ADAs preemption clause, [citation], read together with the [Federal Aviation Administrations (FAAs) ] saving clause,<sup>FNI</sup> stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties bargain, with no enlargement or enhancement based on state laws or policies external to the agreement. (*Id.* at pp. 232-233.) A remedy confined to a contract's terms simply holds parties to their agreements." (*Id.* at p. 229.) The state does not enact or enforce a law simply by enforcing privately ordered obligations. Accordingly, the Court held that plaintiffs claims for breach of contract stemming from the airlines unilateral decision to devalue plaintiffs frequent flyer miles were not preempted because the state court was only required to interpret specific language contained within the parties agreement. (*Id.* at pp. 233-234.)

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FN1. The FAA's savings clause provides, "A remedy under this part is in addition to any other remedies provided by law." (49 U.S.C. § 40120.)

\*3 Courts addressing breach of contract claims after *Wolens* consistently have held claims to be preempted if predicated on obligations imposed by state law external to the agreement of the parties. (See, e.g., *Breitling U.S.A. v. Federal Exp. Corp. D. Conn.* (1999) 45 F.Supp.2d 179, 184 [breach of contract claim preempted because it was based on doctrines of estoppel and waiver to invalidate an express term in the contract; because Breitling seeks to impose common law principles and policies on the agreement between the two parties, Breitling's claims are preempted by the ADA]; *Travel All Over the World v. Saudi Arabia* (7th Cir. 1996) 73 F.3d 1423 [claim for failure to honor reservations not preempted because it was based on defendants' self-imposed commitments to the plaintiffs, but claim for punitive damages preempted because it impermissibly enlarged the scope of the proceedings beyond the parties' agreement.]; *Osband v. United Airlines, Inc.* (Colo.App. 1998) 981 P.2d 616, 621-622 [claim based on promissory estoppel preempted because it would require the court to enforce an equitable remedy created by state law to prevent injustice].) Indeed, a breach of contract claim based on an airline's refusal to permit a passenger to board was preempted even though it was based on the terms of the agreement, where the defenses asserted were based on questions of federal law outside the terms of the contract. (*Smith v. Comair, Inc.* (4th Cir. 1998) 134 F.3d 254, 258 [Because Comair invokes defenses provided by federal law, Smith's contract claim can only be adjudicated by reference to law and policies external to the parties' bargain and, therefore, is preempted under the ADA].)

Here, plaintiffs' claim indisputably relates to the rates and services provided by the defendant, so that the only question is whether the claim is predicated on legal obligations drawn from sources ex-

ternal to the parties' agreement. (*Wolens, supra*, 513 U.S. at p. 226; *Morales, supra*, 504 U.S. at p. 384.) Has plaintiff alleged a breach of a self-imposed contractual obligation, the enforcement of which will not require the court to impose additional obligations on the defendants' frequent flyer program?

#### *Plaintiffs' Claim for Breach of Contract*

Plaintiff's complaint does not allege the breach of an express term found in the frequent flyer membership agreement or in the terms of the ticket itself. Nor does the complaint seek to enforce a term implied in fact in the agreement based upon the parties' reasonable expectations. (See Black's Law Dict. (7th ed. 1999) p. 322, col. 2 [defining an implied-in-fact contract as a contract that the parties presumably intended, either by tacit understanding or by the assumption that it existed].) Although the complaint alleges that consumers "reasonably believed and expected that they would receive the frequent flyer miles when they purchased said non-refundable airline tickets and frequent flyer miles," there is no allegation that the agreement addresses whether a customer's mileage account will be credited if the customer is unable to complete the purchased itinerary, nor does the complaint allege any specific contract terms that might be so interpreted. Rather, plaintiff's brief in this court asserts that the obligation to provide frequent flyer credit in this circumstance should be imposed "as a matter of law." The complaint alleges merely that when consumers purchase tickets, they also are purchasing frequent flyer miles.

\*4 Plaintiff relies on *Delta Air Lines, Inc. v. Sasser* (11th Cir. 1997) 127 F.3d 1296, 1297, in which the court held that appellate court justices assigned to hear a case against an airline need not recuse themselves because they participate in the airline's frequent flyer program. The court stated, "The frequent flyer account which is accumulated in the name of any airline passenger is part and parcel of the services which the passenger buys when he or

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she buys an airline ticket. The price of the ticket pays for any addition to a frequent flyer account just as it pays for the air transportation and other services purchased. We readily conclude that such a frequent flyer account does not represent a gift.” (*Ibid.*) Based upon this reasoning, plaintiff argues that “[a]s a matter of law, California consumers who participate in [defendant’s] frequent flyer programs pay for frequent flyer miles when they purchase airline tickets from the [defendant].” FN2

FN2. Plaintiff attempts to recharacterize his argument somewhat in his reply brief when he states that he “seeks an interpretation of [defendant’s] frequent flyer program.” Plaintiff does not point to any particular provision of the agreements that he wishes the court to interpret. Rather, he continues to rely on the argument that the frequent flyer miles were included in the purchase price of the ticket as a matter of law, and that the failure to award miles to consumers who purchase their tickets but do not use them results in an unjustified forfeiture. Although worded slightly differently, plaintiff’s argument still seeks to impose an obligation on defendant as a matter of law rather than by mutual assent.

*Wolens* makes clear, however, that the court may enforce only the parties bargain, with no enlargement or enhancement based on state laws or policies external to the agreement. (*Id.* at pp. 232-233.) A contract implied in law is “[a]n obligation imposed by law because of the conduct of the parties, or some special relationship between them, or because one of them would otherwise be unjustly enriched. An implied-in-law contract is not actually a contract, but instead a remedy that allows the plaintiff to recover a benefit conferred on the defendant.” (Black’s Law Dict. (7th ed.1999) p. 322, col. 2; *Arcade County Water Dist. v. Arcade Fire Dist.* (1970) 6 Cal.App.3d 232, 236 [An implied-in-law contract is actually not a contract at all, but

merely an obligation imposed by the law to bring about justice].) A contract implied in law thus is based on equitable policies external to the parties’ actual agreement. Plaintiff has alleged no facts suggesting that the basis for the obligation he seeks to enforce is to be found within the terms of the contract. An action to enforce such a claim is preempted by the ADA. (*Osband v. United Airlines, Inc.*, *supra*, 981 P.2d at p. 621.)

Plaintiff does not succeed in transforming his claim into one based on the agreement of the parties by alleging that the refusal to extend frequent flyer credit when the customer fails to use a purchased ticket breaches the covenant of good faith and fair dealing in the contract. This covenant is implied in every contract as a matter of law. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36; *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55.) The obligation to extend frequent flyer credit under these circumstances is no more a self-assumed obligation because it breaches this implied covenant than it would be if the obligation were implied directly into the contract as a matter of law. However the breach may be characterized, the source of the asserted obligation is not a commitment that AA has made to its frequent flyer customers but plaintiffs conception of what fairness requires and what the law should insist upon. Thus, this claim is also preempted. Accordingly, the trial court properly sustained defendants demurrer to plaintiffs UCL causes of action that were premised on these alleged breaches.

\*5 Neither in the trial court nor before this court has plaintiff offered a possible amendment to the complaint that might cure this fundamental defect and circumvent ADA preemption. Thus, the trial court did not abuse its discretion in denying plaintiff leave to amend.

#### Disposition

The judgment is affirmed. Defendant shall recover its costs on appeal.

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We concur: McGUINNESS, P.J., and PARRILLI, J.

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